

**VOICESTREAM WIRELESS**

**Wireless Telephone Service**

*Advertising Agency Unknown*

- When the disclosure of qualifying information is necessary to prevent an advertisement from being misleading, that information should be presented clearly and prominently so that it can be noticed and understood by consumers.

**BASIS OF INQUIRY**

The truth and accuracy of advertising claims by VoiceStream Wireless (“VoiceStream”) were challenged by Verizon Wireless, a provider of telecommunication services. The challenged print advertisements for VoiceStream described an “Introductory Offer” for \$39.99 per month and included the following claims:

- 500 “Free Weekend” and 500 “Anytime” minutes
- “Includes Long Distance and Digital Roaming within NY, NJ & CT.”

The print advertisement also featured a small map showing New York, New Jersey and Connecticut, with each state shaded in full (NY was covered in a slightly lighter shade than its two neighboring states). Some of the challenged print advertisements contained the following disclaimer in a footnote in very small type:

- “All airtime quoted is local airtime (pay no long distance or digital roaming charges) for calls made from the Voice Stream home digital service area in the states listed above.”

**CHALLENGER’S POSITION**

Verizon contended that the challenged print advertisements for VoiceStream Wireless falsely implied:

- 1) that “VoiceStream Minutes” can be used throughout the states of New York, New Jersey and Connecticut; and
- 2) that “VoiceStream Minutes” will not be subject to any long-distance or digital roaming charges.

*The VoiceStream Network*

Verizon argued that the challenged advertisements are misleading because they do not accurately inform consumers of the geographical limitations of the VoiceStream Home Digital Coverage Area. Although the entire map of New York, New Jersey and Connecticut is shaded in, in reality, only portions of New Jersey and Connecticut, and less than 20% of New York State, are included in the home coverage area. To call any number within the Tri-State Area, the consumer making the call *must be in* the VoiceStream Tri-State coverage area. The effect of this limited coverage area means that either consumers will have to pay additional per minute charges for use of their VoiceStream minutes outside the home coverage area, or they simply will be unable to place or receive phone calls. As a result, argued Verizon, the advertising is misleading because the “free minutes” are not available to consumers everywhere within the three states. Moreover, Verizon contended that the footnote disclosure was woefully insufficient to correct this misleading claim.

Verizon explained that there are fundamental differences between the wireless services offered by Verizon and VoiceStream. Verizon offers customers access to a much broader coverage area because, unlike VoiceStream, Verizon phones automatically switch to analog coverage whenever digital network coverage is unavailable. Verizon also has agreements with other telecommunication providers to let its customers roam onto their networks. As a result, argued the challenger, VoiceStream’s use of maps in its advertising create the impression that VoiceStream has the same geographic availability and can be used in the same areas as conventional land-line phones and analog cellular service when in reality, the extent of coverage is considerably more limited.

Verizon noted that VoiceStream’s website claims that making a call to “...your best friend in Buffalo costs no more than calling home from the office. In reality though, a call made to Buffalo (a large city that is outside the coverage area but within the Tri-State Area) will not be connected unless 1) the calling party is in the Coverage Area and 2) the called party in Buffalo is **not** a VoiceStream customer. A VoiceStream customer who is in Buffalo (or anywhere outside the coverage area) cannot place any calls **or** receive any calls.<sup>1</sup>

### *Roaming Capability*

According to the challenger, the advertisement is also misleading because it states, “Digital Roaming within NY, NJ & CT,” when in fact, VoiceStream customers cannot “roam”, except on a digital GSM network and VoiceStream’s is the only GSM network in the tri-state area. According to the challenger, the term “roaming” is generally understood by consumers as the ability to place and receive calls outside the service provider’s coverage area.

Therefore, Verizon contended, the VoiceStream telephone service that is provided *within* the coverage area cannot be considered “roaming” and VoiceStream’s offer, which includes “digital roaming” within the coverage area is misleading.

Verizon also contended that the advertisements’ repeated reference to “Digital Roaming” is misleading because their proximity to the words “Introductory Offer” implies a special VoiceStream feature that is superior to other wireless companies when that is not the case.

### *Footnote Disclosures*

Verizon contended that the advertiser’s footnote disclosure was insufficient to correct the misrepresentations in the advertisements and in fact contradicted the bold claims made in the advertisement. The footnote disclaimer to the advertisement originally challenged provided:

- “All airtime quoted is local airtime (pay no long distance or digital roaming charges) for calls made from the VoiceStream home digital service area in the states listed above.”

The challenger noted that advertisers are not permitted to use disclaimers to change the meaning of a claim or to render truthful an otherwise misleading claim. Verizon contended that the disclaimer contradicts the claims in the advertisement which imply that digital roaming service is possible and that the home coverage area is broader than it actually is. The footnote disclosure, according to Verizon, was also ineffective since it was neither clear nor conspicuous because it appeared in “mouse type” at the very bottom of the full page advertisement and not in proximity to the advertisements misleading representations.

### *New Advertisements*

Verizon also raised concerns about subsequent print advertising for VoiceStream disseminated after the commencement of the challenge. The new advertisement features VoiceStream’s “North American Neighborhood Rate Plans”, and includes a map of the entire area of North America together with the claim:

“Now North America can be your neighborhood. Digital roaming and long distance included across the U.S. and Canada. One price. No surprises.”

Verizon contended that this offer of national coverage is also misleading because VoiceStream offers only limited coverage on a national level and provides no service at all in numerous states.

### **ADVERTISER’S POSITION**

In response to the challenge, VoiceStream asserted that its advertising claims were substantiated and not misleading to consumers.

### *The VoiceStream Network*

The map, according to VoiceStream, correctly shows the area where a subscriber to the plan may call without incurring long-distance charges or roaming fees. VoiceStream argued that any risk of consumer misunderstanding was eliminated by the statement below the map, “includes long distance and digital roaming within NY, NJ & CT.\*” The asterisk links to a footnote at the bottom of the advertisement, which states in part: “All airtime quoted is local airtime (pay no long distance or digital roaming charges) for calls made from the VoiceStream home digital service area in the states listed above.” VoiceStream also noted that Verizon provided no consumer research demonstrating that consumers understand the map to represent the VoiceStream coverage area in the Tri-state region.

VoiceStream explained that the use of map is common in advertising for wireless telephone service and is routinely used to indicate the geographic scope of the “local area” in regional calling plans, but does not mean to suggest that coverage is available *everywhere* within that area<sup>2</sup>. In any event, VoiceStream asserted that this is no longer an issue because, after the commencement of the challenge, it modified its advertising and added a disclosure that, it contends, eliminates any chance of confusion. The disclosure states, “Coverage not available in all areas. Map is not an actual representation of coverage.”

### *Roaming Capability*

VoiceStream disagrees with Verizon's contention that the advertisement falsely represents that customers may "roam" within the entirety of the states of New York, New Jersey and Connecticut without charge. VoiceStream explained that it uses the term "roaming" to refer to use by the customer of their wireless phone outside the customer's home calling area. As a result, argued VoiceStream, its advertising is accurate and draws a legitimate distinction between VoiceStream's calling plan and those of its competitors, including Verizon. VoiceStream's advertising offers "free...digital roaming in NY, NJ and CT." Comparable plans offered by competitors, (Verizon's, for example), do not offer free roaming. Under a Verizon plan, a subscriber who calls from outside the home area incurs a roaming charge even if they are using Verizon's own network. In contrast, VoiceStream customer calling New York from *any* area where VoiceStream provides coverage (San Diego, for example) will not incur a separate roaming charge. The challenger had argued that in this latter example, what is taking place is not "roaming" because the customer is placing a call on the VoiceStream network from an area covered by VoiceStream. VoiceStream noted however, that Verizon provided no evidence as to how consumers understand the term "roaming."

### *Footnote Disclosures*

VoiceStream contended that its footnote disclosures were adequate and followed a format accepted in the wireless telephone industry. VoiceStream argued that all wireless carriers, including Verizon, disclose the conditions to the offers in small print at the bottom of their print advertisements. VoiceStream also contended that the disclosures simply clarify the meaning of the offer, they do not contradict it. The map and headline in the advertisement do not claim that VoiceStream provides coverage in 100% of the home area and consequently, the added disclosure stating "coverage not available in all areas" does not contradict any claim in the main body of the advertisement.

### *New Advertisements*

With respect to the newer advertisements for VoiceStream's North American Neighborhood Rate Plans, the advertiser contended that these were also truthful since the plans advertised eliminate long distance and roaming charges. Under these plans, subscribers can make calls from any location within GSM coverage, whether or not on the VoiceStream network to any active telephone numbers without incurring long distance or roaming charges.<sup>3</sup>

## **DECISION**

NAD has recognized that innovations in the telecommunication industry have resulted in significant benefits to consumers. However, the advertising for these services, including wireless service, has caused considerable consumer confusion, in part, because of the seemingly endless variety of pricing options and included services.<sup>4</sup> NAD noted for the record that neither party submitted communication data to support their conclusions as to any express or implied messages that may have been conveyed. Consequently, NAD relied upon its own expertise to determine how consumers would interpret the challenged advertisements. In doing so, NAD took into consideration the complexity of telecommunications services and the level of confusion that has been recognized in the marketplace. In earlier decisions, NAD has noted that it is very important for advertisers of wireless telephone services to provide clear, accurate and detailed information concerning the service plans and pricing structures in their advertising. NAD evaluated the challenged claims with these general concerns in mind.

At the outset, NAD examined whether the challenged advertising claims were "national advertising" and subject to NAD's review under *NAD Procedures* §1.1(A). The advertiser argued that because the print advertisement originally challenged by Verizon appeared only in the editions of the New York Times distributed in three states (NY, NJ and CT), the advertising should not be considered national in scope. NAD noted however that the challenged advertisement was part of a national campaign for the "Fastest Growing Nationwide Wireless Service" and that a subsequent advertisement which was part of the same advertising campaign, featured telephone calling plans for the Northeastern United States, a substantial portion of the nation. As a result, NAD concluded that the challenged advertising was within its jurisdiction review.

### *The VoiceStream Network*

NAD shared Verizon's concerns that the challenged advertisements do not accurately describe the extent of the Home Coverage Area offered by the plan. The original advertisement states: "Includes Long Distance and Digital Roaming within NY, NJ & CT." The advertisement however does not clearly disclose that there are large geographical areas not included in the coverage area, or that consumers located in those areas will not be able to place or receive calls. These limitations to the coverage area are material facts (i.e., information that could affect a consumer's purchasing decision) and therefore should be clearly and conspicuously disclosed in the advertisements.

Nor was NAD persuaded by VoiceStream's argument that the maps depicted in the advertisements were not intended to be "Coverage Maps" and that consumer confusion would in any event be alleviated by the disclosure, "Coverage not available in all areas. Map is not an actual representation of coverage." NAD determined that, in the context of these advertisements, consumers could reasonably understand the maps as depicting the full areas within which they can place and receive calls and enjoy the advertised benefits of the plan. Verizon also contended that the advertisers proposed disclosure was insufficient because it contradicts the coverage claims made in the advertising. On this point, NAD did not agree with Verizon. If the advertising clearly conveys that the maps are not intended as coverage maps and that coverage is not available in all areas, the use of maps to depict the Plan's home coverage area may be acceptable. The problem was not the language of the disclosure but the fact that the limitations of the coverage area were not clearly conveyed. The disclosure appeared in a mice-type footnote, physically distant from the main text of the advertising claims. As discussed in further detail below, NAD found that the mice-type footnote disclosure was not adequate.

### *Roaming Capability*

The parties disagreed over the meaning of the term "roaming" in advertising for wireless telephone services. Verizon contended that VoiceStream's offer of "Digital roaming within NY, NJ & CT" was misleading" because the service that VoiceStream offered solely on its own network within the home coverage area, and therefore is not roaming. "Roaming," according to Verizon, enables a subscriber to place and receive calls outside the service provider's coverage area. Applying Verizon's definition, telephone service provided *within* the coverage area cannot be considered "roaming" and therefore VoiceStream's offer of digital roaming within the coverage area is misleading. Under the advertised plan a VoiceStream subscriber can also place calls from a GSM digital network outside the Tri-State Area to any number within the Tri-State Area, without incurring "roaming" charges. According to Verizon, these calls cannot be considered "roaming" because only the GSM network is employed and it is therefore misleading to say that there are no roaming charges. Verizon explained that true "roaming" capability enables customers to roam to other digital or analog networks and that VoiceStream does not provide that capability<sup>5</sup>.

VoiceStream contends that consumers do not care whether the carrier providing service is the same one that provides service in his home area; he or she is concerned about whether an extra charge will be imposed for the call. VoiceStream uses the claim "Free...digital roaming within NY, NJ and CT" to tell consumers that they can use a handset anywhere VoiceStream provides coverage and place a call within the Tri-state area without incurring an additional charge (a "roaming" charge).

NAD noted that neither party submitted consumer perception evidence demonstrating how consumers interpret advertising claims that refer to "roaming" "digital roaming", or "roaming charges." Given that the two competitors use different network technologies, it is not surprising that they employ the term "roaming" in slightly different ways. VoiceStream phones do not presently have roaming capability on non-GSM digital or analog networks. However, VoiceStream customers, in areas with GSM coverage (not limited to the VoiceStream network), can roam onto the GSM networks of other companies and call telephone numbers within the VoiceStream home coverage area without incurring additional charge. Moreover, this is a product attribute that VoiceStream should be able to promote. NAD determined that VoiceStream should be able to refer to this service as "roaming" so long as it is clearly communicated what is meant by "roaming" and the advertisement does not imply broader coverage than its wireless telephone service is capable of providing.

NAD was not persuaded by Verizon's contention that the repeated reference to "digital roaming" implied that VoiceStream's service is superior to other wireless companies. In the absence of any evidence that consumers are taking away a superiority message, NAD found no implied claim.

### *Footnote Disclosures*

Although NAD did not find the disclosures in the advertisement's footnote to contradict the advertisement's main message, NAD concluded that the information in the footnote concerning the extent of coverage was material and was not clearly and conspicuously disclosed to consumers. For example, the original advertisement contained the following disclaimer in a small-type footnote:

- "All airtime quoted is local airtime (pay no long distance or digital roaming charges) for calls made from the VoiceStream home digital service area in the states listed above."

Subsequent advertisements contained the following footnote disclosure:

- “Coverage not available in all areas. Map is not a representation of coverage.”<sup>6</sup>

NAD, as well as the Federal Trade Commission, has recognized that “mice type” disclosures at the bottom of a full page newspaper advertisement will not, as a general rule, be sufficient to disclose material information.<sup>7</sup> The issue of fine-print disclosures was also addressed in the Joint FCC/FTC Policy Statement for the Advertising of Dial-Around and Other Long Distance Services to Consumers (“The Policy Statement”). The Policy Statement states:

When the disclosure of qualifying information is necessary to prevent an ad from being deceptive, that information should be presented clearly and prominently so that it is actually noticed and understood by consumers. Disclosures should be effectively communicated to consumers. *A fine-print disclosure at the bottom of a print ad...is not likely to be effective.* (Policy Statement (C)(20) (emphasis added).)<sup>8</sup>

NAD concluded that the footnotes in the challenged New York Times advertisements are precisely the type of fine print disclosure the Policy Statement disparages and to the extent it contains material information, NAD finds it to be an inadequate disclosure..

NAD was concerned that VoiceStream’s use of the map in conjunction with the express offers of “Long Distance” and “Digital Roaming” could give rise to the understanding that the service offered by VoiceStream is available across a broader coverage area than is actually the case. In the context of the advertisements, the information that “Coverage is not available in all areas” and that the “Map is not a representation of coverage” is material and should be more clearly communicated to consumers in type that is easily read, placed in close proximity to the map and claims it is intended to qualify.

NAD was reluctant however, absent evidence of customer confusion, to limit the advertiser’s use of the terms “roaming” and “digital roaming.” Instead, NAD recommended though that VoiceStream clearly communicate what is meant by the offer of “digital roaming” and that it clearly and conspicuously disclose the geographical limitations of its “roaming” service.

## CONCLUSION

NAD concluded that consumers could reasonably interpret the challenged advertisements to mean that VoiceStream offers wireless service over a greater home coverage area than is actually the case. Accordingly, NAD recommended that VoiceStream modify its advertising to more clearly communicate the geographical limitations of its coverage area. NAD further concluded that VoiceStream offers “digital roaming” but to avoid potential consumer confusion, NAD recommended that it more clearly communicate what is meant by “roaming” and clearly and conspicuously disclose the limitations of its roaming service.

## ADVERTISER’S STATEMENT

VoiceStream Wireless Corporation is pleased with NAD’s determination that VoiceStream’s disclosures sufficiently qualify its coverage claims in advertisements that include a geographic map. VoiceStream is also pleased with NAD’s determination that VoiceStream’s digital roaming capability “provides a consumer benefit that it should be free to promote.”

Although VoiceStream respectfully disagrees with NAD’s conclusion that the type size and placement of its disclosures fails to convey completely the disclosed message to consumers, VoiceStream desires to address NAD’s concerns and recommendations in a constructive manner. Accordingly, VoiceStream will modify future print advertisements for its wireless service that contain a map of a geographic area by increasing the size of its disclosures. In addition, if other disclosures are made in a particular advertisement containing a map, the coverage disclosures will be printed first. Also, to further draw consumer attention to the disclosure, VoiceStream will continue to place an asterisk adjacent to the map or to a listing of states where no roaming charges will apply and will place another asterisk at the beginning of the disclosure statement. Given these changes, VoiceStream does not believe that it is necessary to place the disclosure statement immediately adjacent to the map.

VoiceStream supports NAD’s self-regulation efforts and appreciates NAD’s careful analysis of the various claims raised in the challenge.

## EDITOR'S NOTE

NAD's findings are contained exclusively in the "Decision" section of the case report. The publication of the Advertiser's Statement is not intended to serve as a restatement of the Decision and the modifications described in the Advertiser's Statement have not been reviewed or approved by NAD. (#3714 DGM, closed 12/12/00)

## NOTES

1. If a VoiceStream subscriber is not in an area covered by a GSM network, the subscriber's wireless phone will not ring. VoiceStream explained that subscribers outside the coverage area can still be reached via voice-mail.
2. According to VoiceStream, the challenger, Verizon makes a similar use of maps in its own advertising.
3. According to VoiceStream, approximately two-thirds of the United States population lives within the coverage area of a GSM wireless system.
4. Sprint PCS Wireless Service, *NAD Case Reports*, June 1999; See Joint Policy Statement for the Advertising of Dial-Around and other Long-Distance Services to Consumers, FCC 00-72, March 1, 2000.
5. Verizon, for example offers dual-mode phones allowing customers to roam onto both analog networks and other digital networks. VoiceStream offers only single-mode phones limited to the GSM digital network. According to VoiceStream, the GSM digital network covers approximately two-thirds of the United States population.
6. According to Verizon, the footnote was printed in "no more than 4 point type" at the bottom of full-page advertisement in the New York Times.
7. AT&T, *NAD Case Reports*, February 2000, p. 58.
8. Although the Policy Statement does not specifically address advertising for wireless service, the principles concerning the adequacy of disclosures are well established and are equally applicable. *See also* 16 C.F.R. § 308 (The Telephone Disclosure and Dispute Resolution Act).